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The constitutionally erected wall of separation between church and state is the only viable foundation for maintaining religious freedom and for preserving our public school system. The patchwork of recent court decisions and State and Federal legislation concerning aid to parochial schools threatens to erode that wall. Justifications for such aid are based on (1) separability of religious and secular functions of parochial schools, (2) provision of proper public welfare assistance to all students, even when they are not enrolled in public schools, (3) cries of discrimination against religion, or (4) saving of taxpayers' money. Some of these justifications are couched in fallacious reasoning and all become unimportant in the face of constitutional principle. Current aid to parochial schools is establishing the precedent for future demands for aid by more religious groups who desire to segregate their children from the public schools, which have been of vital importance as a great cultural "melting pot" for national unity. (DE)

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THE "WALL OF SEPARATION" BETWEEN CHURCH AND STATE*

by John F. E. Hippel+

INTRODUCTION

It is my premise that the "wall of separation" erected between church and State by the "establishment clause" of the First Amendment tc the Federal Constitution offers the only sound foundation for maintaining religious freedom in America and preserving the public school system as we know it.

While the prayer and Bible reading decisions of the Supreme Court stand out as evoking the most emotional public response, the more significant decisions, from the point of view of their effect upon the public school system, have in my judgment dealt with the issue of aid to parochial schools (primarily Catholic, occasionally Protestant, and Orthodox Jewish).

Before attempting to explain my position, - that public aid to church related schools can ultimately mean the demise of the public school system, - let me explore with you both the legal and factual background that brings this controversy into current focus. Thereafter, I will examine the arguments most frequently advanced for aid to parochial schools and my answers to them. Finally, I would like to

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EA 002 405

offer what I consider to be sound reasons for maintaining a strong public school system.

I. BACKGROUND (the law)

(a) The Constitution

The Constitutional prohibition is stated in simple and precise terms: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." This, of course, is a prohibition upon the federal government and despite similar prohibitions in most state constitutions, it did not affect state government relationships vis-á-vis religion until the Supreme Court determined that the Free Exercise clause of the First Amendment applied to the states through the Fourteenth Amendment.[1]

(b) Standing to Sue

While we are on procedural issues, it might be well to point out that as recently as two years ago, under the presumed continuing vitality of the Frothingham doctrine, a federal taxpayer did not have the requisite interest to challenge the constitutionality of a federal statute.[2] The decision in Frothingham was based upon a lack of direct or threatened injury to the individual taxpayer. The Court held that Acts of Congress cannot be challenged by an individual taxpayer absent some direct injury suffered or threatened to the party invoking the Courts aid. But, in 1968, the Supreme Court set aside the 45-year-old Frothingham ruling and held that a federal taxpayer has standing to sue in order to challenge federal enactments (including taxing measures) which allegedly exceed specific constitutional limitations.[3] According to the Court in Flast, the Founding Fathers considered the separation of church and state to be a fundamental

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1. See e.g. Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943); Everson v. Board of Educ. 330 U.S. 1 (1947)
2. Frothingham v. Mellon, 262 U.S. 447 (1923)
3. Flast v. Cohen, 392 U.S. 83 (1968)

constitutional guarantee and drafted the First Amendment as a bulwark against potential abuses of the taxing and spending powers possessed by the government. The Flast decision is most significant, for until 1968 the Frothingham case effectively barred taxpayer instituted suits that challenged the use of federal funds to aid religious activities or institutions.

(c) Decisional Law

Turning to the specific issue of federal (or state) aid to non-public schools, we must initially consider the most important contemporary decision of the Supreme Court interpreting the establishment clause of the First Amendment -- Everson v. Board of Educ.[4]

In Everson, the Court held constitutional public reimbursement to parents for the cost of bussing their children to parochial schools. The facts in the case are relatively simple. A New Jersey State statute permitted the use of public funds to reimburse parents of parochial school students for money expended by them for bus transportation. Both the local regulation implementing the state law and the law itself were challenged unsuccessfully in the state courts on the ground that they violated the First Amendment's prohibition against the establishment of religion. The Supreme Court upheld the New Jersey State Court in a 5 to 4 decision, but emphasized that the Establishment Clause was intended to erect what Thomas Jefferson called "a 'wall of separation' between Church and State." In reaching this result, the Court found that providing public funds for bus transportation of students to and from schools, including parochial schools would not support or aid religious instruction, but would serve a bona fide public welfare purpose because it provided safe transportation for non-public school children. Speaking to

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4 330 U.S. 1 (1947)

the issue of public aid to religious institutions, the Court said through Justice Black:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . . No tax in any amount, large or small, can be levied to support any religious activity or institutions whatever they may be called, or whatever form they may adopt to teach or practice religion.

Id. at 330 U.S. 1, 15-16.

Unfortunately, this case has been recently cited by proponents of both views. In essence, the 5 to 4 Everson decision held only that public welfare benefits may not be denied to children on the basis of their religious affiliation. Specifically, the Court approved public payment of bus fares of parochial school children as "public welfare legislation protecting children going to and from church schools from the very real hazards of traffic."[5] It is, however, clear that the state may not, consistent with the First Amendment, lend its support to religion. The issue that the Everson decision did not decide was whether the state may directly benefit religious educational institutions if such a result occurs in the furthering of the state's legitimate secular purpose of providing an education.

The next cases of importance deal with the shared-time concept. In McCollum v. Board of Educ.[6] the Court held unconstitutional a released-time program established by the public schools of Champaign, Illinois where school children were excused one hour per week for religious instruction on school property. Students were not required to attend, although in the alternative they

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5 Id. at 17.
6 333 U.S. 203 (1948)

were required to remain in school for study hall sessions while their classmates received religious instructions. The effect, according to the Court, was to use the public schools to promote religious instruction, which in this case was provided by religious leaders.

When the instruction did not take place on school premises, however, the Supreme Court took a somewhat different view. Zorach v. Clauson.[7] In Zorach, the Court stressed the state's proper role in "accommodating" religious institutions. The fact situation in the Zorach case involved a religious instruction program similar to that in the McCollum case, the significant distinction being that the religious instruction was given off school property at nearby religious centers. The lack of evidence of coercion to compel attendance of the religious programs in New York in the Zorach case, was considered to be important by the Court. Writing for the majority, Justice Douglas said that the state may properly respect the religious nature of its people and accommodate the public service to their spiritual needs.

The recent decision of Board of Educ. v. Allen,[8] holds that it does not violate the establishment clause of the First Amendment to permit the extension of a State's free textbook program to include children attending religious schools. Allen is a significant case, for in my view it will no doubt increase state legislative attempts to provide aid to educational institutions affiliated with a religious body. In essence, Allen stands for the proposition that the state is not precluded from pursuing secular purpose programs which give

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7 343 U.S. 306 (1952)
8 392 U.S. 236 (1968)

incidental aid to religion. According to a recent report in the New York Times, the Allen decision "deepens the already serious inroads that have been made into the vital principle of church-state separation." The reasons for concern are clear, for the Allen case extends the form of aid to parochial schools beyond fringes such as transportation, lunches and medical programs to books which are much more directly concerned with a religious school's educational process.

(d) Recent Legislation

By enacting the Elementary and Secondary Education Act of 1965 (ESEA), [9] the Federal Government has already commenced a form of assistance to parochial schools. Title I of the Act is designed to assist educationally deprived children under the general public welfare or child-benefit theory as set forth in Everson v. Board, and Allen v. Board, supra. Title I projects involve non-institutional services such as remedial reading or speech therapy. Title II of the Act provides for school library resources and other instrumental materials to parochial schools. No substantial federal aid program had been approved by Congress prior to the enactment of ESEA because of religious and integration questions. In light of the decision of Flast v. Cohen, supra, the constitutionality of this Act will be tested in the Courts shortly. The results will have far reaching implications for the future of both public and private education in this country.

In addition to the ESEA program, many state legislators have been yielding to pressures from local constituents to adopt state aid programs to parochial schools. Interestingly enough, one

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9 20 U.S.C. §241(2) - 241 (1), 821-827 (1964)

of the country's first successful forms of state aid to parochial schools began in July of 1968 in my home state of Pennsylvania. Under the Pennsylvania statute the Commonwealth gave $4.3 million in 1968-69to non-public schools as a reimbursement for each student for studying mathematics, a foreign language, physical education and/or a physical science.[10] The foot in the door theory is borne out here, for already there is a strong move to increase aid in Pennsylvania to $75 million by July of this year according to a recent report in the Philadelphia Sunday Bulletin.[11] Parochial school needs are obviously great and growing as will their demands upon the public purse.

On March 26, the Wall Street Journal reported a similar move in the Michigan legislature where support is being sought for a $40 million appropriation for Michigan's non-public schools, the vast majority of which are Catholic-run. As reported, similar legislative campaigns are in progress in some 17 states - including Illinois, Connecticut, Indiana and New Jersey.

According to the same Wall Street Journal article . . .

> "Tuition grants or tax credits to the parents of private school pupils or through direct payment to the schools themselves [proposed legislation in the 17 states] . . . would greatly broaden state aid [to non-public schools] . . . Schools run by Protestant, Jewish and non-sectarian groups also would benefit from non-public aid measure . . . ."

Pennsylvania Representative Martin Mullen summed up

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10 24 P.S. § 5601-5609 (1968)

11 A. R. McGill, Catholic Schools Face Financial Crisis, The Sunday Bulletin, April 6, 1969 §1 at page 10, Pa. House Bill No. 674 (1969) (Passed House 114 to 76, March 25, 1969, referred to State Senate)

the basis of the support for such bills when he said that if the parochial schools should close, the public schools would face an unparalleled financial crisis. He added that education as good as that in public schools is available in the parochial schools at a fraction of the cost. State Representative J. Robert Traxler, a Bay City, Michigan Democrat, echoes Mullen's comments. "We can't afford not to help the non-public schools," insists the chief sponsor of the Michigan Parochial School Assistant's bill: "To fail to provide public funds to help educate children in private schools, would be to pass up our state's biggest bargain in education." Bishop John B. McDow, Superintendent of Schools in the Pittsburgh diocese, has said that additional money being sought will alone "keep us in the ballgame."

The bussing of non-public school children has received wide acceptance in many states and has indirectly deflected substantial funds earmarked for education from public schools into the parochial school systems of the country. The funds for such programs come from tax sources which might otherwise have been made available to public schools, whose mounting financial needs are increasingly hard to meet. This is evident by the growing taxpayer revolt throughout the country which has resulted in the defeat of numerous school bond referendums by the voters. I know that programs exist in Ohio, New Jersey, New York, and Pennsylvania; I am sure many other states could be added to this list. In Pennsylvania, the pertinent act provides for the transportation of pupils attending non-public schools over established public school bus routes.[12] In addition to State efforts

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12 24 P.S. §13-1361 (1965).

being made throughout the country, several national pressure groups have sprung up which are supporting legislation similar to that proposed for adoption in Michigan and in other states throughout the country.

Opponents of public aid to parochial education maintain that the flood of hundreds of millions of dollars to support parochial schools in many states will severely threaten the theory behind the First Amendment of the Constitution which was designed to prevent church rule or influence in our public institutions. Associate Professor George LaNoue of Teachers' College, Columbia University, has cautioned, "We must be careful that the principle of separation of Church and state is not destroyed piecemeal by accommodating the partisans of religious schools with expedient legislative compromises that become irreversible precedents." This vast drain of tax money for religious schools may "severely damage; if not destroy, our public school system," concludes Prof. LaNoue. This remains to be seen, however, if the Supreme Court eventually upholds church use of public funds, nearly three hundred different religious denominations in the United States in addition to the Roman Catholic Church could demand public funds to create their own private school systems.

So far bus rides to parochial schools, school lunches and health programs, released time classes not conducted on public school property and the loan of publicly owned non-religious textbooks to parochial school students have all been held by the Supreme Court as not to be the kind of aid to religion prohibited by the Establishment clause of the First Amendment. However, the proponents of Federal and State aid to non-public schools say that this is not enough if they are to survive. They cite spiraling operating costs, a

marked decline in the number of priests and nuns available for educational duty and some declines in church revenue due to current Catholic liberalization which has displeased some older Catholics, and made younger Catholics more apt to be critical about how church resources should be spent. All of these factors have contributed to the present financial crisis facing Catholic schools today. The Very Rev. Msgr. George E. Murray of Manchester, New Hampshire, said that 1971-72 diocese school year projections show that non-public schools, "will be priced right off the market" unless they receive outside financial help.

What then is the proper function of government in fulfilling its legitimate role of promoting the education of its children in a society where religious schools share, to a degree, in the secular aspects of that function?

Perhaps it would be useful in considering this question to review in a little more depth some of the more familiar arguments put forward by proponents of state and federal aid to parochial schools.

II. THE CASE FOR AND AGAINST AID TO PAROCHIAL SCHOOLS

(a) Restricted Grants

As stated by the Catholic Bishops of the U.S.

> The private and church-related schools are part of the American system . . . they exist by right; and they are unquestionably carrying a large share of the educational burden . . . . Their schools have every claim in fact and in justice to be recognized as powerful contributing factors in the building of a better and freer country . . . . It is true that in the case of religious schools . . . they exist to teach positive religion as the integrating element of the curriculum. But surely, religion itself is not a discordant factor in American life. [13]

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13 Statement of the Catholic Bishops of the U.S., National Catholic Welfare Conference, Washington, D.C., 1955.

The point made here is simply this; there is a distinction within the parochial school system that can be made between the religious function and the secular function which it serves. Recognition of the secular function warrants the appropriation of a certain percentage of public funds proportionate to the cost to the state of providing for that portion of a Catholic child's education. In essence, the request is for the public to finance the secular aspects of education in parochial schools.

The problem with this argument constitutionally is that the allocation of public funds, albeit for restricted purposes, releases additional church revenue for strictly religious purposes and thus is a form of aid to religion. When critically analyzed the restricted grants argument places form over substance and accomplishes a constitutionally prohibited result, for a "Catholic education" is more than religious instruction in a catechism class, it is an overall concept which provides for the education of the whole child in the tradition and heritage of the Catholic Church. In essence established religious schools are an extension of the Church which supports them, otherwise they would have no reason for an independent existence. To support such an enterprise even in part is to promote the propagation of religious faith. This is clearly prohibited by the Constitution.

(b) Child Benefit Theory

This theory seeks to distinguish between proper public welfare assistance to the child and invalid direct public aid to support the parochial schools. Many have placed substantial reliance upon this theory as a compromising solution to the First Amendment prohibition.

But, this theory lacks effective control or limitation. Moreover, it can be similarly argued that state created and financed public schools already afford children all of the educational benefits of public welfare legislation. This was underscored by Justice Brennan when he said: "[t]he Constitution enjoins those involvements of religious with secular institutions which . . . use essentially religious means to serve governmental ends where secular means would suffice."[14] In addition, the "aid the child" approach would funnel subsidies to parents and then directly into the parochial school's treasury. Tuition money paid to parents for the education of their children would, of necessity, have to be accounted for as having been paid to a limited number of educational institutions including church run schools. Public money would thereby be used for strictly religious purposes (accounting procedures notwithstanding). It is submitted that under this theory there is no effective way to protect the public subsidy from exceeding the secular education service allegedly provided by parochial schools. This is true because in the church related school religious indoctrination is generally a concomitant part of the entire educational fare. Incidentally, it is interesting to note that not many years ago the cry for help was limited to "health and safety benefits" and "standard non-religious textbooks" which the late Cardinal Spellman of New York insisted had "nothing to do with the separation of church and state."[15] How far we have travelled in the few short years since 1949 when Cardinal Spellman took this position.

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14 School Dist. v. Schempp, 374 U.S. 203, 231 (1963) (concurring opinion).

15 The New York Times, Cardinal Spellman, August 6, 1949.

(c) Religious Discrimination and Saving the Taxpayers' Money

Whatever the extent of Catholic demands may be, many Catholics take the position that to restrict Federal aid to public schools is discrimination. They maintain that Catholic parents are duty bound to provide their children's education in a religious setting.

Some Roman Catholics maintain that to constitutionally permit them the right to educate their children in schools of their own choice and at the same time to require them to financially support the public schools is tantamount to imposing double taxation. The argument goes on that a financial crisis in the Catholic school system has already caused the closing of a number of schools throughout the country. Church officials say that they have utilized the offering plate to the limit. Now, they say, financial assistance will have to come from somewhere else. Coupled with the current inflationary spiral and increased costs from all sides there has been a marked decline in the number of American Catholics entering religious vocations. According to another Wall Street Journal article, the U. S. Catholic grade and high schools now employ some 90,000 lay teachers, up from about 35,000 only ten years ago with a corresponding increase in costs.16

It is reported that even Nuns are now demanding more money. Robert Woyt, editor of the National Catholic Reporter cites low pay as a major reason for Nuns leaving education for other fields. An exodus of Nuns from teaching into more rewarding fields such as nursing, social work, psychology and counseling has intensified the problem. It is reported that whenever a Nun quits she must be replaced by a lay teacher who commands four

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16 Tim Metz, Church School Aid, the Wall Street Journal, March 26, 1969, p. 1

times the $150 -- per month -- salary of a sister.

Probably the most persuasive reason offered by proponents of public support for parochial schools is found in the simple argument that church supported schools save the U. S. taxpayer millions of dollars annually. This argument does not, of course, touch upon the constitutionality of such aid. That there should be no question of the propriety of granting a fair share of federal-aid funds to church related schools is the cry of many American Roman Catholics. Supporters cite the fact that if the parochial schools suddenly closed, the public school system would face an unparalleled financial crisis. According to recent figures, Catholic grade and high school enrollments nationally exceed 4.5 million pupils (1967-68 term).17 It is estimated that the cost to educate these children in public schools would be approximately 13 billion dollars annually. This would be in addition to the already spiraling costs of public education in the United States. Some public school educators agree that a mass influx of Catholic students into their schools would cause problems. Eventually, however, they say, the Catholic children could be absorbed into the public system.

The claim of "double taxation" can be shown to be a myth, however, when critically examined by objective observers. The constitution guarantees freedom of religion and nothing more. Public education is available to all children, regardless of race, creed or color or any other qualification. Those who want a private church-related education for their children seek a special privilege. And they should be required to pay for this privilege, just as parents

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17 See note 14 supra.

who send their child to a non-sectarian private school, day nursery or summer camp, pay for that privilege.

If a Catholic parent sends his child to a parochial school, he is no more subject to double-taxation than a childless couple, an aged widow, a bachelor; or millions of other citizens who pay local taxes for public schools and other municipal and state services whether they use them or not. Public Schools have become a community responsibility. Parochial school tuition is in reality a private purchase. It is well to point out here that the tuition reimbursement plan is not analogous to a government old age assistance program. Under the government assistance program a citizen is free to spend his money according to his own dictates, which may or may not include a donation in the church collection plate. However, under the child-tuition program the government, of necessity, requires that the grant be paid to a restricted group of institutions most of which are church-related.

III. INDISPENSIBILITY OF THE PUBLIC SCHOOL SYSTEM IN THE UNITED STATES AS A POSITIVE FORCE FOR NATIONAL UNITY

It is my primary thesis in opposing federal and/or state aid to parochial schools that this aid will result in proliferation of sectarian schools and contribute to the dissipation of the public school system which has been and continues to be of vital importance as a great "melting pot".

(a) Fostering Denominational Schools

The establishment of a system of church-related schools has in my judgment been discouraged primarily by a lack of tax support. As soon as such support becomes uniformly available great numbers of students could withdraw from public schools in favor of state supported religious schools. A further consideration

is the probability of equal support to non-sectarian private schools which could pose additional strains on the continuance of public schools in certain areas. As it would not be proper to aid the parochial schools of one religious sect and not another, so it would not be proper to give aid to church-related schools to the exclusion of other private schools. The former would "prefer one religion over another" while the latter would "aid all religions as against non-believers."

It should not be difficult to support the position of Rev. Gerald E. Knoff, executive secretary of the Division of Christian Education of the National Council of the Churches of Christ in the U.S.A. Rev. Knoff said:

> Parochial schools do not contribute to the public welfare any more than churches, Sunday Schools, church-youth societies, church camps, and all the rest of the educational efforts of American Protestantism and Orthodoxy --[which] contributions to the common good.

(b) National Unity and the Public School

It is freely conceded by many authorities that one of America's great contributions in the history of nations has been the establishment of the first real separation of the church and state. In America, religion and government have flourished side by side as independent entities. The public school system represents a significant implementation of the Constitutional doctrine which separates church and state. As such, the public school system can be and in many cases is a microcosm, an ideal expression of the American way of life. Public schools have and can continue to foster national unity in a positive way by acting as an instrument and catalyst to promote an interchange of ideas and personalities among the nation's future citizens before more provincial and narrow ones can develop. This is

true because public schools alone provide a common meeting ground for peoples of different ethnic, racial, financial and religious backgrounds. Here they intermingle and have a unique opportunity to understand one another which enables them to better cope with their future problems. Furthermore, although the public school systems are similar in many respects throughout the country, control is basically vested in local government which itself is a contributing factor to the propagation of the "republican" form of government in America. Increasing federal aid to public schools may change this in the future. I shall defer further comment on this point until some future occasion.

For all of these reasons the public schools make a unique contribution by preparing its students to be, to borrow the terms of a critic, "useful and well adjusted citizens in a [viable and] democratic society." Such a system should not be tampered with lest its unifying force role be lessened.

Under the surface of this whole question also lurks the problem of racial integration. If massive aid to parochial schools becomes a reality, then we face the very real danger of encouraging those religious sects who do not have significant Negro memberships to set up religious schools where at least one purpose could be to frustrate normal integration processes. How will the government distinguish between legitimate religious sects and other groups seeking to promote segregation and other undesirable ends?

The realistic and practical question posed for solution to persons such as myself, who oppose aid to non-public schools, is whether or not the public school system can absorb the more than 4.5 million children presently being educated in the parochial school system. I am assuming here that the constitutional question is ultimately resolved against further aid to parochial schools.

Frankly the problem is less formidable than might at first glance be suspected. The United States with its vast industrial resources and dynamic economy will simply have to dig down deeper to pay the bill. I for one stand ready to pay my share. I suspect that many others share this conviction and willingness.

However irresistible financial pressures may be, they seemingly have been overcome to a degree greater than many would expect, because approximately one-half of the Catholic children in the United States presently attend public schools. Furthermore, it is far from certain that all Catholics will withdraw their children from Parochial schools unaided by public funds.

I am afraid that the hard cold facts of life, however, do call for a substantial reduction in the number of parochial schools in the country. If, as many parochial school proponents say, the church-school teaches religion only one or two hours a day, why not send all Catholic children to public school for the secular subjects and to the churches for periods of religion. This approach is actually in line with that of many young Catholic liberals who want to "phase out" parochial schools. Contending that they "foster a kind of socio-religious segregation" Mary Perkins Ryan in her book, "Are Parochial Schools The Answer?" calls them "an auxiliary service, not part of the essential mission of the Church." Actually, the development of a program of after-hours religious schools will undoubtedly turn up as one of the few well-conceived long range answers to the problem.

Already, the Marist Brothers, an established Catholic teaching order, have announced that they will not open any new parochial schools, but will instead concentrate on the establishment of religious centers in close proximity with existing public schools.

In Columbia, Maryland, a new city which has been built from the ground up, it was agreed in advance by all faiths that public schools alone would serve everyone in the community. A common religious center has been created where Protestants, Catholics, and Jews can conduct their own religious instructions and community programs. Cardinal Shehan of Baltimore, Maryland, has approved this plan; the Rev. Blain Pfister of the National Council of Churches has dubbed it "an impressive effort to relieve the tensions of the parochial school system."

This is not to say, however, that I as well as others do not join with Justice White in the "recognition that private education has played and is playing a significant and valuable role in raising levels of knowledge, competence and experience . . . ."18

Obviously many parochial schools will continue to operate and continue to provide, along with other non-sectarian private schools, a valuable educational experience. Private schools, regardless of their persuasion, will remain as an effective alternative to public schools and provide a needed educational competition. Their primary effectiveness is fostered, however, in direct proportion to their independence of the state. It is inevitable that public funds will carry corresponding controls; the imposition of such controls would, in many respects, defeat the purpose of the private schools.

Finally, I should like to point out that our Country is already torn by racial and economic division. Religious feelings run as deep among partisans as do racial views. It does not make sense to add to our current domestic burdens the stress of inter-

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18 Board of Educ. v. Allen, supra.

religious tensions and strife.

The "wall of separation" established by our forefathers in the Constitution should be kept in good repair.